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TO: Federal Trade Commission
RE: 16 CFR Part 436—Franchise Rule Comment
FROM: Howard R. Morrill
DATE: December 22, 1999

I am Howard Morrill, shareholder in the Seattle, Washington law firm of Bundy & Morrill. I have been engaged in private in the State of Washington since 1987. My practice has always emphasized franchise law and regulation and I am a member of the ABA Forum on Franchising. The vast majority of my practice time is spent representing franchisees, mostly in litigation with their franchisors.

At the outset, I think the proposed amendments are a substantive improvement. I note, in particular, the desirability of a "franchise seller" concept (which is wanting perhaps only in some apparent inconsistency in its use) and the notion of the "de facto officer". Any move toward recognizing reality as opposed to mere form is a positive development.

I want to focus my comments on three topics: (1) earnings claims; (2) the use and abuse of integration clauses and their ilk; and (3) franchise "renewal". In general, I believe the failure to require franchisors to provide earnings claims is tantamount to a concession that the single most material piece of information any potential franchisee is interested in will continue to be provided chiefly by indirection and sleight-of-hand. With respect to integration clauses (and "no reliance" statements, etc.), I agree whole-heartedly with the quoted comments of Mr. Lagarias and, further, I think it defeats the very purpose of the Rule to allow franchisors to draft away their responsibility for pre-sale statements contained in brochures and other marketing pieces which were created with the sole objective of selling franchises. Finally, I can state with assurance that my franchisee clients do not understand the term "renewal" to mean what it means to the franchise industry.

The Commission has recognized the materiality of earnings information. Therefore, by refusing to require its disclosure, the Commission makes a significant departure from the general requirement that all material information be disclosed. Apparently the Commission feels that this will allow the market to govern on the theory that it will give a competitive advantage to franchisors willing to make earnings claims. Unfortunately, this view ignores the reality I see every day in my practice, because *all franchisors* now make earnings claims. I have never met with any franchisee who had not received a representation of the potential income from the franchised business. The first question is simply whether the earnings claim was made lawfully or unlawfully.

If an earnings claim was made unlawfully, or if any other material representation was made outside of the offering circular, my concern becomes the problem of proving the case in the face of my client's preprinted representation that it never happened and/or the integration clause which, among other things, will disclaim the reasonableness of relying on the franchise salesperson with whom my client dealt and the glossy brochure that convinced my client to buy the franchise. This use of integration clauses calls to mind

that popular definition of "lawyer" as "one who assists businessmen to commit their crimes with lowered risk." If the Commission refuses to prohibit the use of integration clauses in this fashion, then I would like to suggest an alternative that will, I think, preserve the purpose of the Franchise Rule. My suggestion is simply this: if a franchisor wishes to disclaim statements made in any marketing piece, that marketing piece should be specifically identified in the franchise agreement as a document upon which the franchisee is not entitled to rely. Franchisors should not be permitted to have it both ways—either they stand by what they say in their glossy brochures or they do not.

Finally, I have never met a franchisee who did not understand the term "renewal" to mean a subsequent term of same (or materially the same) agreement. The term "renewal" is therefore inherently misleading to franchisees. What they are typically offered at the expiration of their term is a *new franchise*, not a renewal. I would therefore urge the Commission to adopt different terminology to describe the disclosures concerning expiration of a franchise.

Thank you for this opportunity to address these concerns.

Sincerely,

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